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7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10
11 **JANE DOE,**

12 **Plaintiff,**

13 **v.**

14 **CITY OF SAN MATEO,**

15 **Defendant.**

Case No. 3:07-CV-5596

**NOTICE OF MOTION AND MOTION BY
JAMES MASON TO INTERVENE AS
DEFENDANT; MEMORANDUM OF
POINTS AND AUTHORITIES**

16
17 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

18 Please take notice that on Friday, January 11, 2008, at 9:30 a.m., or as soon thereafter as the
19 matter may be heard before the Honorable Magistrate Judge Joseph C. Spero in Courtroom A of
20 the United States District Court for the Northern District of California, located at 450 Golden
21 Gate Avenue, San Francisco, California, James Mason ("Mason") will and hereby does move this
22 Court to allow him to intervene in the above-entitled action under Rule 24 of the Federal Rules of
23 Civil Procedure. Mason is an individual that has been named as a defendant in a state court
24 action arising out of the same events as the above-entitled action, and is employed by the San
25 Jose Police Department. Mason seeks to intervene in order to submit the Motion to Unseal the
26 Complaint or Alternatively, Motion to Modify the Protective Order, (attached hereto as Exhibit
27 A) on behalf of the Defendants.

28 **///**

1 Mason is entitled to intervention as of right pursuant to Rule 24(a) of the Federal Rules of
2 Civil Procedure because (1) his application to intervene is timely, (2) he has an interest relating to
3 the subject matter of this action, (3) he is so situated that the disposition of this action may, as a
4 practical matter, impede his ability to protect his own interests, and (4) his interests are not
5 adequately represented by the Defendants.

6 Alternatively, Mason is entitled to permissive intervention pursuant to Rule 24(b) of the
7 Federal Rules of Civil Procedure because (1) this Court is not required to establish an
8 independent ground for jurisdiction where the intervenor simply seeks to modify a protective
9 order, (2) this application to intervene is timely, (3) Mason's claims are not required to assert
10 questions of law or fact in common with the present action as he seeks only to challenge a
11 protective order, and (4) allowing Mason to intervene at this early stage of proceedings will not
12 unduly delay or prejudice this Court's adjudication of the original parties' rights.

13 This motion is based on this Notice of Motion and Motion, the supporting Memorandum of
14 Points and Authorities, all pleadings, records and papers filed in this action, such matters as the
15 Court may judicially notice, and such further evidence or argument as may presented at or before
16 the hearing of this motion.

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18 Dated: December 4, 2007

Respectfully Submitted,

19 **RAINS, LUCIA & WILKINSON LLP**

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21 /s/

22 By: Harry S. Stern
23 Attorneys for Intervenor JAMES MASON
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MEMORANDUM OF POINTS AND AUTHORITIES**I
INTRODUCTION**

On November 20, 2006, the Plaintiff in this case filed suit in state court against Intervenor James Mason. In a separate but concurrently filed state action against the San Mateo County Sheriff's Office, and the San Mateo Police Department (two of the original Defendants in this action), Plaintiff alleged that the Defendants had failed to investigate her claims of Mason's sexual assault, and that they had falsely arrested and imprisoned her on the evening that she was removed from Mason's home. The Plaintiff herself designated these two actions as being related, and they were eventually consolidated. Although Plaintiff eventually dismissed the action against the public entity defendants, choosing instead to proceed solely against Mason in state court, the complaint that is the basis for this litigation is based on the same set of facts as the original state actions. Worthy of some notice is the fact that, in addition to the original public entities she had sued in state court, Plaintiff has also identified individual police officers of the San Mateo Police Department, and the San Jose Police Department (by whom Mason is employed) as Defendants in this action. Furthermore, at this time, in her state action against Mason, Plaintiff has noticed the deposition of the two individual officers that are named in this complaint, demonstrating the relationship between the two cases.

Perhaps of even greater concern, Plaintiff now subjects the Defendants in both cases to possible conflicting pleadings and legal arguments, as well as the unnecessary expense of time and resources. Access to the records of this case will ease the tasks of the courts in both cases, and will facilitate timely and cost-effective trials for all parties as the facts, parties, and issues between the suits are identical.

In light of the facts noted above, Mason is entitled to intervention as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. First, this motion is timely as it has been brought less than one month after Plaintiff filed her federal complaint. Second, Mason has an interest in the action because in addition to naming other officers employed by the San Jose

1 Police Department, Plaintiff now subjects the Defendants in both cases to possible conflicting
2 pleadings and legal arguments, as well as the unnecessary expense of time and resources, as the
3 witnesses in all cases will testify to the same facts and events. Third, the disposition of this case
4 may, as a practical matter, impede the ability of Mason to protect his personal interests in the state
5 action pending against him, as that court may view this court's ruling as persuasive, thus, in
6 effect, binding Mason to the holding, or Mason may be subject to claims and arguments asserted
7 by the Plaintiff that are wholly inconsistent with those presented in this case. Finally, Mason's
8 ability to protect his interests is not adequately represented by the original Defendants in this
9 action as they are bound by the protective order in this case only, and will likely limit their
10 defense arguments to emphasize their own proper conduct.

11 Alternatively, Mason is entitled to permissive intervention under the provisions of Rule
12 24(b). First, no independent ground for jurisdiction is necessary where an intervenor does not
13 seek to litigate a claim or assert a defense, but merely seeks to eliminate or modify a protective
14 order sealing documents. Second, as discussed above, Mason's motion is without question
15 timely. Third, the action Mason seeks to take is not required to have questions of law and fact in
16 common with the instant case since he seeks only to challenge the protective order issued in this
17 action. Finally, because Mason seeks to intervene at the outset of this litigation, there will be no
18 undue delay or prejudice of this Court's adjudication of the original parties' rights.

19 Accordingly, this Court should grant Mason's Motion to Intervene either as of right
20 pursuant to Rule 24(a) or permissively under Rule 24(b). Only through intervention will Mason
21 be able to properly move to unseal or modify the complaint, which will be necessary to avoid
22 substantial and irreparable injury on account of all parties, particularly the Defendants.

23 II 24 ARGUMENT

25 A. MASON MAY INTERVENE AS OF RIGHT

26 Federal Rule of Civil Procedure 24(a)(2) governs intervention of right, providing in
27 relevant part:

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1 Upon timely application anyone shall be permitted to intervene in
2 an action:

3 [W]hen the applicant claims an interest relating to the property or
4 transaction which is the subject of the action and the applicant is so
5 situated that the disposition of the action may as a practical matter
6 impair or impede the applicant's ability to protect that interest,
7 unless the applicant's interest is adequately represented by existing
8 parties.

9 Fed. R. Civ. P. 24(a)(2). Courts have found Rule 24(a) to have established four requirements of
10 intervention as a matter of right: timeliness; an interest relating to the subject of the action;
11 practical impairment of the party's ability to protect that interest; and inadequate representation
12 by the parties to the suit." *Yorkshire v. U.S. Internal Revenue Serv.*, 26 F.3d 942, 944 (9th Cir.
13 1994) (citing *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990)).

14 Courts have liberally adhered to the requirements of intervention as of right, as a broad
15 construction serves the interests of all parties, and the court, in efficiently resolving legal issues
16 and simplifying the litigation surrounding other related issues. See *Forest Conservation Council*
17 *v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n. 8 (9th Cir. 1995); *United States ex rel. McGough v.*
18 *Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992). Here, in light of Mason's substantial
19 practical interest in this litigation, and construing Rule 24(a)(2) in a manner that is consistent with
20 the court's express interests, Mason should be allowed to intervene as of right.

21 1. Mason's Motion to Intervene is Timely

22 The timeliness requirement, rather than imposing a precise time limit, means that a proposed
23 intervenor must act with "dispatch." See *Nissei Sangyo Am., Ltd. v. U.S.*, 31 F.3d 435, 438 (7th
24 Cir. 1994); *San Jose Mercury News, Inc. v. U.S. District Court-Northern District (San Jose)*, 187
25 F.3d 1096, 1100-01 (9th Cir. 1999). Over time, it has become apparent that acting with
26 "dispatch" is synonymous with a reasonableness standard, as an intervenor must be reasonably
27 diligent in learning of an action that might affect his/her rights. *Nissei Sangyo*, 31 F.3d at 438.
28 Upon learning of such actions, s/he must act with reasonable promptness to intervene. *Id.* Three
factors determine whether a proposed intervenor has acted with such haste: (1) the stage of the

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1 proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the
 2 reason for and length of the delay. *San Jose Mercury News*, 187 F.3d at 1100-01.

3 There can be no question that Mason has acted with dispatch in the present case. Plaintiff
 4 filed her complaint under seal, using a "Doe" appellation, less than one month ago. No discovery
 5 appears to have been conducted as this action is still in its most preliminary stages. Therefore,
 6 there can be no prejudice to any of the parties should Mason intervene in this case at this time.
 7 Accordingly, Mason's application is timely.

8 **2. Mason has an Interest Related to the Subject of the Action**

9 "An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest
 10 that is protected under some law, and (2) there is a 'relationship' between its legally protected
 11 interest and the plaintiff's claims." *U.S. v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002)
 12 (citation omitted). The relationship requirement is met "if the resolution of the plaintiff's claims
 13 actually will affect the applicant." *Id.* "The 'interest' test is primarily a practical guide to
 14 disposing of lawsuits by involving as many apparently concerned persons as is compatible with
 15 efficiency and due process." *County of Fresno v. Adrus*, 622 F.2d 436, 438 (9th Cir. 1980).

16 An individual undoubtedly has an interest in a lawsuit arising out of the same facts and
 17 events that are the basis of another case pending against him individually, particularly when
 18 several of the named defendants are identified because of their role in fulfilling their duties with
 19 the intervenor's employer. Plaintiff now subjects the Defendants in both cases to possible
 20 conflicting pleadings and legal arguments, as well as the unnecessary expense of time and
 21 resources, as the same witnesses in all cases will testify to the same facts and events. Because
 22 Mason is directly and substantially impacted by the proceedings of this case, Mason has an
 23 interest in the subject matter of this action.

24 **3. Mason will Suffer Practical Impairment of His Ability to Protect His** 25 **Interest Should He Not be Permitted to Intervene**

26 In addition to employment concerns arising by having his coworkers involved in a wrongful
 27 action related to his own conduct, the disposition of this case may, as a practical matter, impede
 28 the ability of Mason to protect his personal interests in the state action pending against him, as

1 that court may view this court's ruling as persuasive, thus, in effect, binding Mason to the
2 holding. Additionally, Mason may be subject to claims and arguments asserted by the Plaintiff
3 that are wholly inconsistent with those presented in this case. As noted throughout, by having
4 the same witnesses testify to the same facts and events, all parties are subject to inefficient, costly,
5 and duplicative efforts. Therefore, the only practical way for Mason to protect his interests is
6 through intervening in this action.

7 **4. Mason's Interests are Not Adequately Protected by the Original**
8 **Defendants to this Action**

9 In considering whether the existing parties adequately represent an applicant's interests,
10 courts have considered the following three conditions: (1) whether one of the present parties will
11 *undoubtedly* make *all* of the intervenor's arguments; whether a present party is capable and
12 willing to make such arguments; and (3) whether the applicant would offer any necessary
13 elements that would be neglected by the other parties. *See City of Los Angeles*, 288 F.3d at 398.
14 However, the applicant's burden is ever so slight, as s/he need only show that the representation
15 *may* be inadequate. *Forest Conservation Counsel*, 66 F.3d at 1498.

16 Clearly, only the original Defendants to this action would conceivably seek to pursue
17 Mason's efforts to unseal or modify the complaint, as the plaintiff in both cases is the same
18 individual. However, as the original Defendants are undoubtedly focused on demonstrating their
19 own proper conduct in the course of the events that transpired, Mason's need for access to the
20 records of this case will not be of primary concern. As only the record of *this* case has been filed
21 under seal, the Defendant's are not subject to the same risk as Mason that claims and arguments
22 developed by the Plaintiff may be wholly inconsistent from case to case. Furthermore, although
23 all parties are subject to the inefficient, costly, and duplicative efforts created by Plaintiff's filing
24 of separate actions in separate courts, the Plaintiff's own willingness to accept such a wasteful
25 process demonstrates the possibility that all parties do not perceive such waste equally.

26 Therefore, the only way to ensure that Mason's interests are adequately represented is to allow
27 him to intervene in this action.

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B. MASON MAY PERMISSIVELY INTERVENE

Even if this court determines that Mason cannot intervene as a matter of right under Rule 24(a), it should nonetheless permit Mason to intervene under Rule 24(b). Rule 24(b) provides that:

Upon timely application anyone may be permitted to intervene in an action:

(2) when an applicant's claim or defense and the main action have a question of law of fact in common . . .

In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2). Courts have long held that intervention under Rule 24(b) is the appropriate method for a third party to challenge a protective order. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472-73 (9th Cir. 1992) citing *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988). In *Venegas v. Skaggs*, 867 F.2d 527 (9th Cir. 1989), the Ninth Circuit explained that a court may exercise its discretion in allowing permissive intervention under Rule 24(b) if the applicant can establish: (1) an independent ground for jurisdiction over its claims or defenses; (2) that its application to intervene is timely; and (3) that the applicant's claim or defense has a question of law and fact in common with the main action. *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989), *aff'd*, *Venegas v. Mitchell*, 495 U.S. 82 (1990). The application of those facts here weighs heavily in favor of granting Mason permissive intervention.

1. No Independent Ground for Jurisdiction is Necessary Where an Intervenor does Not Seek to Assert a Claim or Defense, but Merely Seeks to Eliminate or Modify a Protective Order

Although the Court in *Venegas* suggested that an independent ground for jurisdiction over the claims and defenses is necessary, where an intervenor does not seek to litigate a claim on the merits, but simply to modify a protective order sealing documents, no independent jurisdictional basis is required for intervention. *See Beckman Industries, Inc.*, 966 F.2d at 473; *see also United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427-28 (10th Cir. 1990). Because Mason seeks only to unseal or modify the protective order the need for jurisdiction is satisfied.

1 **2. Mason's Motion to Intervene is Timely**

2 As discussed above, Mason's Motion to Intervene is timely because it acted more than
3 reasonably in seeking such a motion. In determining whether an application is timely under Rule
4 24(b), a court should apply the same test that it uses to determine whether an application is timely
5 under Rule 24(a). *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th
6 Cir. 1997). For all the reasons discussed above, Mason's application is unquestionably timely.

7 **3. Although Mason's Claims have Questions of Law and Fact in Common**
8 **with the Present Action, such Commonality is Not Required When an**
9 **Intervenor Seeks Only to Challenge a Protective Order**

10 As is the case with independent jurisdiction, "[w]hen a collateral litigant seeks permissive
11 intervention solely to gain access to discovery subject to a protective order, no particularly strong
12 nexus of fact or law need exist between the two suits." *United Nuclear Corp.*, 905 F.2d at 1427
13 (citing *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 164 (6th Cir. 1987)). However,
14 as noted throughout this motion, the facts and events that are the basis of the two actions are
15 identical.

16 **4. Mason's Intervention Will Not Unduly Delay or Prejudice the**
17 **Adjudication of the Rights of the Original Parties**

18 Because this litigation began less than one month ago, permitting Mason to intervene will
19 neither delay nor prejudice the adjudication of the rights of the original parties. To the contrary,
20 granting Mason's application will ensure that all parties with a stake in this matter will have a
21 chance to be heard, and act in an efficient manner as the facts and events are identical in the two
22 cases.

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**III
CONCLUSION**

James Mason undoubtedly has a substantial interest in this action, and these interests may be compromised should he not be allowed to intervene. Mason has met the requirements for intervention of right and, in the alternative, permissive intervention. Accordingly, James Mason respectfully requests that his Motion to Intervene be granted.

Dated: December 4, 2007

Respectfully Submitted,

RAINS, LUCIA & WILKINSON LLP

/s/

By: Harry S. Stern

Attorneys for Intervenor JAMES MASON

Exhibit A

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12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 **JANE DOE,**

14 **Plaintiff,**

15 **v.**

16 **CITY OF SAN MATEO,**

17 **Defendant.**

Case No. 3:07-CV-5596

**[PROPOSED] ORDER UNSEALING THE
COMPLAINT**

18 After full hearing, and having considered the moving and opposing papers, evidence and
19 exhibits, and good cause appearing therefore, IT IS HEREBY ORDERED THAT:

20 The Intervenor's Motion to Unseal the Complaint is granted.

21
22 Dated: _____

23 Hon. Magistrate Judge Joseph C. Spero

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10
11 **JANE DOE,**

12 **Plaintiff,**

13 **v.**

14 **CITY OF SAN MATEO,**

15 **Defendant.**

Case No. 3:07-CV-5596

**[PROPOSED] ORDER MODIFYING THE
PROTECTIVE ORDER**

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17
18 After full hearing, and having considered the moving and opposing papers, evidence and
19 exhibits, and good cause appearing therefore, IT IS HEREBY ORDERED THAT:

20 The Intervenor's Motion to Modify the Protective Order is granted. Intervenor James
21 Mason is to be permitted access to all documents filed with this court pertaining to the above-
22 entitled action, in accordance with the rules imposed upon the original defendants to this matter.
23 Intervenor James Mason shall also be granted access to all matters of discovery in this case,
24 subject to the determinations of the collateral court.

25
26 Dated: _____

27 Hon. Magistrate Judge Joseph C. Spero